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7 **UNITED STATES DISTRICT COURT**
8 **EASTERN DISTRICT OF WASHINGTON**

9 CASEY CLARKSON,

10 *Plaintiff,*

11 v.

12 ALASKA AIRLINES, INC, and
13 HORIZON AIR INDUSTRIES,
INC.,

14 *Defendants*

No. 2:19-CV-005-TOR

15 **PLAINTIFF'S OPPOSITION TO**
16 **DEFENDANTS' MOTION FOR**
17 **SUMMARY JUDGMENT**

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Declaration of Vincent Cheng with the following attachments:

Exhibit 1: Excerpts of the Transcript of the Rule 30(b)(6) Deposition of Alaska Airlines, Inc. through its Designated Representative S. Elizabeth Ryan on May 5, 2020 (“Alaska Dep.”)

Exhibit 2: Excerpts of the Transcript of the Rule 30(b)(6) Deposition of Horizon Air Industries, Inc. through its Designated Representative Bernadette Davis on May 6, 2020 (“Horizon Dep.”)

Exhibit 3: Excerpts of the Transcript of the Deposition of Alison Lee Faddis on March 5, 2021 (“Faddis Dep.”)

Exhibit 4: Excerpts of the Transcript of the Deposition of Casey Clarkson on May 28, 2020 (“Clarkson Dep.”)

Exhibit 5: Defendants’ May 8, 2020 Objections and Responses to Plaintiffs’ Third Set of Interrogatories

Exhibit 6: Defendant Horizon Air Industries, Inc.’s March 12, 2021 Objections and Responses to Plaintiff’s First Set of Requests for Admission

Exhibit 7: Defendant Alaska Airlines, Inc.’s March 12, 2021 Objections and Responses to Plaintiff’s First Set of Requests for Admission

Exhibit 8: Excerpts of Collective Bargaining Agreement Between Horizon Air Pilot Group as Represented by the International Brotherhood of Teamster Local 1224 and Horizon Air Industries, Inc. Effective February 1, 2016 through December 31, 2024, produced by Defendants in this litigation and bates-stamped ALASKA_CLARKSON_0001638

Exhibit 9: Email thread dated June 22, 2017 from Alison Donway to Bill Thomson, produced by Defendants in this litigation and bates-stamped ALASKA_CLARKSON_0004240 to ALASKA_CLARKSON_0004241

1 Exhibit 10: Email thread dated June 12, 2017 from Brian Miller to Bill
2 Thomson, bates-stamped ALASKA_CLARKSON_0004255 to
ALASKA_CLARKSON_0004257

3 Exhibit 11: Horizon Air Pilots' System Board of Adjustment – Submission
4 of Grievance QXE-2017-14, produced by Defendants in this
litigation and bates-stamped ALASKA_CLARKSON_0024102
5 to ALASKA_CLARKSON_0024105

6 Exhibit 12: Letter of Agreement 05-01, "Currency During Military
Conflict," between Alaska Airlines, Inc. and the Air Line Pilots
7 Association, dated May 1, 2005, produced by Defendants in
this litigation and Bates-stamped
8 ALASKA_CLARKSON_0000435 to
ALASKA_CLARKSON_0000437;

9 Exhibit 13: Letter of Agreement 05-01, "Currency During Military
Conflict," between Alaska Airlines, Inc. and the Air Line Pilots
10 Association, dated May 1, 2005, produced by Defendants in
this litigation and Bates-stamped
11 ALASKA_CLARKSON_0000690 to
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12 Exhibit 14: Excerpts of the Deposition of Ronald Limes on February 26,
13 2021 ("Limes Dep.")

14 Exhibit 15: Excerpts of the Deposition of William Thomson on February
15 18, 2021 ("Thomson Dep.")

16 Declaration of Casey Clarkson

17 Declaration of Jeffry Cox with the following attachments:

18 Exhibit A: Credit Matrix produced by Defendants in this litigation and
Bates-stamped ALASKA_CLARKSON_0001797

19 Exhibit B: Email dated May 3, 2017 from Jeffry Cox to Alison Donway,
20 Bates-stamped ALASKA_CLARKSON_0024163

21 Exhibit C: Email dated December 1, 2017 from Carlos Zendejas to Jeffry
Cox, Bates-stamped ALASKA_CLARKSON_0024135

1 Exhibit D: Revised Credit Matrix produced by Defendants in this litigation
2 and Bates-stamped ALASKA_CLARKSON_0024136
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INTRODUCTION

Defendants Horizon Air Industries, Inc. (“Horizon”) and Alaska Airlines, Inc. (“Alaska”) have both maintained policies under which pilots on short-term military leave do not receive benefits afforded pilots who take other, comparable forms of leave. Horizon also maintained a policy under which Plaintiff was demoted, denied seniority benefits, and discharged for taking military leave.

Defendants have moved for summary judgment on all of Plaintiff’s claims. As to the Paid Leave Claim (Count IV), Defendants assert that they do not offer a benefit to pilots on short-term military leaves that they do not also offer to pilots on jury duty leave, bereavement leave, sick leave, or vacation (the “Comparator Leaves”). But the Comparator Leaves are protected from loss of pay, while short-term military leave is not (and is unpaid). Defendants also argue that the Comparator Leaves are not comparable to short-term military leaves. But weighing the factors set forth in the Department of Labor (“DOL”) Regulations—duration, purpose, and the ability of pilots to choose when to take leave—a reasonable jury could find each leave comparable to the short-term military leaves taken by pilots.

As to the Virtual Credit Claims (Counts I-III), Defendants misunderstand both their reemployment obligations under USERRA and the legal standard for what constitutes a seniority benefit under the statute. Finally, as there is evidence that Defendants were on notice of their violations of USERRA, there are genuine

1 issues of material fact as to liquidated damages that should be put to the jury.

2 Defendants' motion should thus be denied.

3 STATEMENT OF FACTS

4 I. Mr. Clarkson's Military Status and Leaves with Horizon and Alaska

5 Clarkson was a member of the Washington Air National Guard for 26 years
6 until June 30, 2018. Clarkson Dep. at 14:10-15:12; Ex. 6 at Nos. 18-19. He worked
7 for Horizon as a Turboprop pilot from November 2013 until he was hired by
8 Alaska on November 6, 2017. *Id.* at No. 19; ECF No. 31 ("Compl.") & ECF No.
9 32 ("Answ.") ¶ 13. While employed by Horizon, he took leave to perform military
10 duties including (1) from June 8, 2017 through July 8, 2017, and (2) September 26,
11 2017 through October 26, 2017. Ex. 6 at Nos. 13-14; ECF No. 73-22 at 2; ECF No.
12 82-6 at 2. Clarkson also took short-term military leave to perform military duties
13 while employed at Alaska and Horizon. Compl. & Answ. ¶ 55.

14 II. Horizon's Virtual Credit Policy

15 Horizon Pilots bid their trip schedules for each month from the 2nd through
16 the 8th day of the month prior. Ex. 5 at 4; Horizon Dep. at 112:2-4. Horizon had a
17 system of "Pilot Seniority" based on length of service. Ex. 8 § 11.A. Horizon
18 awarded monthly schedules for trips and days off based on pilots' preferences *in*
19 *seniority order*. Horizon Dep. at 83:1-17, 109:24-110:4, 111:12-24, 119:13-16;
20 Clarkson Dep. at 30:11-19; ECF No. 138-8 § 13.C.7; Cox Decl. ¶ 10. Turboprop
21 pilots were generally assigned the status of "Regular Line Holder" (*i.e.* with "a line
of flying") or "Reserve Pilot" (*i.e.*, on call). ECF No. 138-8 § 5.B.1.b. To maintain

1 their minimum pay guarantee for Regular Line Holders, Turboprop pilots must be
2 awarded a line schedule and “line of flying” and work at least 70 hours during a
3 bid period (*i.e.*, a calendar month). Horizon Dep. at 136:4-14; Clarkson Dep. at
4 104:20-105:6 & 221:20-22. Reserve Pilots were not awarded a line of flying, but
5 were on call and assigned duties “from trips that become available last minute.”
6 Horizon Dep. at 73:8-74:2. Horizon’s scheduling program for Regular Line
7 Holders required a minimum of 74 hours, but Turboprop pilots were usually
8 assigned a line of 74-80 work hours per month. Cox Decl. ¶ 6. Regular Line
9 Holders had a more predictable schedule than reserve pilots. Horizon Dep. at
10 210:18-211:2; Cox Decl. ¶ 8.

11 Horizon launched a new scheduling system called Preferential Bidding
12 System (“PBS”) through which pilots bid their schedules and Horizon awarded,
13 “based on seniority,” their lines for May 2017 and after. ECF No. 5 at 4; ECF No.
14 138-8 at 9; Horizon Dep. at 71:12-15, 118:11-17, 148:7-10; Cox Decl. ¶ 10. About
15 the same time, Horizon implemented a Virtual Credit Policy pursuant to a “Credit
16 Matrix” that credited Turboprop pilots taking military leave in May 2017 or after
17 with 2.45 “virtual credit” hours per day through PBS. ECF No. 5 at 4; ECF No. 73-
18 16; Horizon Dep. at 124:16-125:1; Cox Decl. ¶ 5. For each flight flown, Turboprop
19 pilots were credited a minimum of 4.0-4.2 hours per day (even if they flew less)
20 and received more credit for longer trips. Horizon Dep. at 121:2-5, 123:6-9,
21 123:24-124:2, 171:11-17; Clarkson Dep. at 219:6-10. As a result of the low virtual

1 credit hours, some pilots were denied a line of flying and the pay guarantee for
2 Regular Line Holders and forced into reserve status in the month they took military
3 leave. Horizon Dep. at 138:13-139:25; Faddis Dep. at 24:3-25:21; Cox Decl. ¶ 13.

4 For example, Clarkson was credited 19.6 virtual credit hours for his July 1-8,
5 2017 military leave even though he would have most likely worked 6 out of those
6 8 days based on his typical schedule of at least 4 hours a day or a total of 24 credit
7 hours. ECF No. 73-22 ¶ 5. Horizon denied him a line of flying and forced him into
8 reserve status for July 2017. *Id.*; Clarkson Dep. at 207:21-209:9; Ex. 6 at No. 8.

9 And Clarkson worked 14 days the rest of month—two more days than he would
10 have worked had he not been on military leave. ECF Nos. 82-6 ¶ 3 & 82-7; ECF
11 No. 138-8 at App. F. To avoid being forced into reserve status in October 2017,
12 Clarkson worked extra hours by flying additional and longer trips when he was not
13 on military leave, and on days that would have been his days off. Clarkson Dep. at
14 251:15-252:17; ECF No. 73-22 ¶ 6; ECF No. 82-6 ¶ 6. Had military leave been
15 properly credited (i.e., as if he was working), he would have received premium or
16 “overtime” pay for those extra hours and/or additional trips. *Id.*; Clarkson Dep. at
17 253:6-12, 283:2-284:14; Ex. ECF No. 138-8 § 5.F.

18 **III. Complaints About the Virtual Credit Policy’s Violation of USERRA**

19 By May 3, 2017, Horizon learned that the daily 2.45 virtual credit hours
20 provided to Turboprop pilots for military leave were “too low.” Cox. Decl. ¶ 14 &
21 Ex. B; Faddis Dep. at 18:20-19:8, 22:12-24:17, 24:24-25:21, 28:7-31:14. A pilot
filed on May 11, 2017 a grievance against Horizon that the virtual credits provided
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1 for military leave were too low and violated USERRA, and requested Horizon to
2 provide “premium pay.” Ex. 11; Faddis Dep. at 59:11-25, 60:25-61:3, 64:6-65:16.
3 Although the pilots union tried in May 2017 to negotiate an increase in the credit
4 hours for military leave, Horizon refused to agree. Cox Decl. ¶ 15 & Ex. B.
5 Clarkson complained in June 2017 to Horizon management about the adverse
6 effects the Virtual Credit Policy had on him. ECF No. 73-22 ¶ 7; Ex. 10; Faddis
7 Dep. at 38:7-18. Horizon’s management, including then-Chief Pilot Alison
8 Donway (now Faddis), agreed that the virtual credit for military leave was too low.
9 Ex. 10; Ex. 9; Faddis Dep. at 12:23-13:16, 34:24-35:5, 38:7-40:2, 42:12-44:9,
10 49:9-50:13. In response to Clarkson’s administrative complaint, the DOL found on
11 October 4, 2017 that the Virtual Credit Policy violated USERRA and that Clarkson
12 is entitled to damages at his premium rate. ECF No. 73-25; Clarkson Dep. at
13 248:8-249:11; ECF No. 82-8. Horizon never took steps to remedy that violation.

14 **IV. Leaves of Absence and Pilot Compensation at Horizon and Alaska**

15 Pilots at Horizon are guaranteed a certain number of hours of pay per month
16 based on their status as regular or reserve lineholders and turbojet or turboprop
17 pilots. ECF No. 138 at 14. Similarly pilots at Alaska are guaranteed a certain
18 number of hours of pay per month, based on their status as a line holder or reserve
19 pilot. ECF No. 138-12 at 4-1. When pilots take unpaid leaves, their minimum
20 guaranteed pay is decreased for each day of unpaid leave. ECF No. 138 at 14;
21 Horizon Dep. at 47:6-16; Alaska Dep. at 113:9-21; ECF No. 138-12 at 4-1. All
military leaves are unpaid. Horizon Dep. at 47:6-16; Alaska Dep. at 70:8-11.

1 Alaska categorizes military leave of 30 days or less as short-term rather than
2 “extended” military leave. Alaska Dep. at 121:12-20; Ex. 12; Ex. 13. Horizon also
3 distinguishes short-term from other military leaves. Horizon Dep. at 59:8-19.

4 Alaska and Horizon provide leaves of absence to employees that are
5 “protected from Loss of Pay” such that taking those leaves does not reduce a
6 pilot’s minimum guarantee. ECF No. 138-8 at 14, 74-75. Alaska Dep. at 86:24-
7 87:7, 88:3-7. Such leaves include leaves for jury duty, bereavement, sick, and
8 vacation. ECF No. 138-12 at 7-4, 13-1, 14-2, 26-2. ECF No. 138-8 at 14, 74-75.

9 ARGUMENT

10 Summary judgment is appropriate only if the evidence shows that there is no
11 genuine dispute of material facts. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323
12 (1986). “In order to carry its burden of production, the moving party must either
13 produce evidence negating an essential element of the nonmoving party's claim or
14 defense or show that the nonmoving party does not have enough evidence of an
15 essential element to carry its ultimate burden of persuasion at trial.” *Nissan Fire &*
16 *Marine Ins. Co. v. Fritz Cos., Inc.*, 210 F.3d 1099, 1102 (9th Cir. 2000). If these
17 requirements are met, the nonmoving party must set forth “facts showing that there
18 is a genuine issue for trial.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256
19 (1986). There only needs to be enough evidence on which a jury “might return a
20 verdict in [the party’s] favor.” *Id.* at 257; *Zetwick v. County of Yolo*, 850 F.3d 436,
21 441 (9th Cir. 2017). All evidence and factual inferences are viewed “in the light

1 most favorable to the [non-moving] party.” *Scott v. Harris*, 550 U.S. 372, 378
 2 (2007). The court cannot “weigh the evidence or determine the truth of the matter.”
 3 *Metal Jeans, Inc. v. Metal Sport, Inc.*, 987 F.3d 1242, 1244 (9th Cir. 2021).

4 **I. Summary Judgment Should be Denied on the Paid Leave Claim (Count**
 5 **IV).**

6 “[A] person who is absent from a position of employment by reason of
 7 service in the uniformed services” must receive the same non-seniority “rights and
 8 benefits” they provide similarly situated employees who are on a “leave of absence
 9 under a contract, agreement, policy, practice, or plan.” 38 U.S.C. § 4316(b)(1)(B).
 10 “If the non-seniority benefits to which employees on furlough or leave of absence
 11 are entitled vary according to the type of leave, the employee must be given the
 12 most favorable treatment accorded to any comparable form of leave.” 20 C.F.R. §
 13 1002.150(b). Pilots at Alaska and Horizon who take leave for sickness, jury duty,
 14 bereavement, or vacation¹ (the “Comparator Leaves”) are protected from loss of

16 ¹ Defendants suggest vacation should be considered because it is not explicitly
 17 mentioned in the Complaint. Mot at 27 n.5. But Rule 8 only requires a complaint to
 18 “give the defendant fair notice of what the plaintiff’s claim is and the grounds
 19 upon which it rests.” *Pickern v. Pier 1 Imports (U.S.), Inc.*, 457 F.3d 963, 968 (9th
 20 Cir. 2006). A complaint need not “plead specific legal theories ... so long as the
 21 other side receives notice as to what is at issue in the case.” *Pac. Coast Fed’n of*
Fishermen’s Ass’n v. Glaser, 945 F.3d 1076, 1086 (9th Cir. 2019). The use of
 “including” explains that the list of comparable leaves was non-exclusive. Am.
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1 pay. But pilots who take short-term military leave lose pay. Under USERRA §
2 4316(b), pilots on military leave are entitled to the same loss of pay protection as
3 comparable leaves.

4 Defendants move for summary judgment as to Count IV on two grounds.
5 First, they assert that Defendants do not provide the benefit Plaintiff seeks. But the
6 pilots at Horizon and Alaska who take Comparator Leaves do not lose pay, while
7 pilots who take short-term military leave do. Second, Defendants argue that the
8 Comparator Leaves are not comparable to the leaves taken by members of the
9 Class. But the evidence establishes genuine issues of material fact appropriate for
10 resolution by a jury at trial, not on summary judgment.

11 **A. Defendants Provide the Benefit of Protection from Loss of Pay to**
12 **Pilots Who Take the Comparator Leaves.**

13 Defendants assert that there is “no benefit” that “employees on non-military
14 [leave] receive but those on military leave do not.” ECF No. 136 (“Mot.”) at 8.
15 This argument misstate the record and is without any basis in the statutory text or
16 case law. USERRA defines “rights and benefits” as follows:

17 the terms, conditions, or privileges of employment, including any
18 advantage, profit, privilege, gain, status, account, or interest (including
19 wages or salary for work performed) that accrues by reason of an
20 employment contract or agreement or an employer policy, plan, or
21 practice and includes ... awards, bonuses, severance pay, supplemental
unemployment benefits, vacations, and the opportunity to select work

21 Compl. ¶ 84. Defendants have known since at least class certification that vacation
was a Comparator Leave. ECF No. 73 at 8.

1 hours or location of employment.

2 38 U.S.C. § 4303(2). This “broad” definition encompasses “compensation at the
3 normal rate during a leave of absence.” *White v. United Airlines, Inc.*, 987 F.3d
4 616, 621 (7th Cir. 2021); *Scanlan v. Am. Airlines Grp., Inc.*, 384 F.Supp.3d 520,
5 528 (E.D. Pa. 2019) (same).² At both Horizon and Alaska, this benefit is afforded
6 to pilots on certain leaves of absence and is called protection from loss of pay or
7 pay-protection. At Horizon, the pilot CBA provides that:

8 Loss of Pay means a reduction in [a pilot’s] minimum pay guarantee
9 for the Bid Period, or loss of the credit value of trips missed. (Where
10 this Agreement indicates a Pilot will be excused without, or with no
Loss of Pay, the Pilot will not have his guarantee reduced for the period
the Pilot is unavailable, and he will be given credit for the value of trips
missed).

11 ECF No. 138-8 at 7. Alaska uses the terms “pay-protect” and “paid-protected” to
12 describe the same concept. Alaska Dep. at 86:24-87:7, 88:3-7. Each of the
13 Comparator Leaves at Horizon is “protected from Loss of Pay” and does not
14 reduce a pilot’s minimum pay guarantee. ECF No. 138-8 at 14-15 (“paid vacation,
15 paid sick leave or other paid time off” will not reduce minimum guarantee), 74
16 (leave for “jury duty will not suffer any Loss of Pay”), 74-75 (providing three days
17 without “Loss of Pay” for bereavement leave). The same leaves are pay-protected
18 at Alaska. ECF No. 138-12 at 7-4 (vacation paid and credited); 13-1 (emergency
19

20 ² The only decision to depart from this consensus, *Travers v. FedEx Corp.*, 473
21 F.Supp.3d 421 (E.D. Pa. 2020), is currently on appeal to the Third Circuit and its
reasoning was rejected by the Seventh Circuit. *White* at 987 F.3d 621.

1 charged against sick leave), 14-2 (sick leave paid and credited), 26-2 (jury duty).
2 Short-term military leave is not protected from Loss of Pay or pay-protected at
3 either airline, but is unpaid. Horizon Dep. at 47:6-16; Alaska Dep. at 70:8-11,
4 113:9-21 (explaining that unpaid absences reduce a pilot's minimum guarantee).
5 Contrary to Defendants unsupported assertion that their policies "do not establish
6 the benefit of the continued receipt of one's wages during a leave of absence" that
7 is precisely what these protections from loss of pay provide for pilots who take the
8 Comparator Leaves. Mot. at 10-12.

9 Defendants conjure the phrases "USERRA benefit," "freestanding benefit,"
10 or "whole benefit" to manufacture a distinction where none exists. Mot. at 8-9. But
11 these are invented concepts without basis in the statute and that distorts case law.

12 First, Defendants appeal to the "nature of the benefit" test applied by *Moss v.*
13 *United Airlines, Inc.*, 420 F.Supp.3d 768 (N.D. Ill. 2019). Mot. at 12. But this test
14 applies to distinguish between seniority benefits under § 4316(a) and non-seniority
15 benefits under 4316(b). *Moss*, 420 F.Supp.3d 771. As that is not an issue in this
16 case, the appropriate standard whether a benefit is a "right or benefit" is the broad
17 statutory definition of 38 U.S.C. § 4303(2). *White*, 987 F.3d at 621-623.

18 Second, Defendants assert without citation that Plaintiff views the benefits
19 as two separate benefits – (i) the right to leave work and (ii) the right to receive
20 wages. Mot. at 12-13. Precisely because Defendants provide benefits with both
21 components, but only the former component for military leave, is what establishes

the USERRA § 4316(b) violation. *White*, 987 F.3d at 625; *Tully v. Dep't of J.*, 481 F.3d 1367, 1370 (Fed. Cir. 2007) (rejecting argument that comparable leave was different because the comparator leave was paid while military leave was unpaid).

Finally, Defendants suggest that USERRA only protects vacation and sick leave as a form of paid leave, but not the right to accrue benefits. Mot at 12-13. Not only is this irrelevant, but USERRA also protects the accrual of leave while on military leave if such leave would accrue for other absences. *Paxton v. City of Montebello*, 712 F.Supp.2d 1007, 1016 (C.D. Cal. 2010). It wrongly assumes that a list of examples “create[] a tacit exception” to the broad definition. *Bostock v. Clayton County*, 140 S. Ct. 1731, 1747 (2020) (rejecting similar argument).

B. Whether the Comparator Leaves are Comparable to the Class’s Short-term Military Leaves are Genuine Issues of Material Fact.

The DOL has established a multifactor test for determining whether leaves are comparable for purposes of 38 U.S.C. § 4316(b):

In order to determine whether any two types of leave are comparable, the duration of the leave may be the most significant factor to compare.... In addition to comparing the duration of the absences, other factors such as the purpose of the leave and the ability of the employee to choose when to take the leave should also be considered.

20 C.F.R. § 1002.150. As multiple courts have explained, “[t]his [comparison] is primarily a question of fact.” *White*, 987 F.3d at 625 (citing *Rogers v. City of San Antonio*, 392 F.3d 758, 771-72 (5th Cir. 2004)). Construing the facts and inferences in the light most favorable to Plaintiff, a jury could find each of the Comparator Leaves comparable to short-term military leave because they are all

(1) are in the overwhelming majority of cases, only a few days long, (2) share common purposes of public service and civic duty, and (3) are similar in terms of the ability of pilots to choose when to take the leave.

1. The Short-term Military Leaves of Paid Leave Class Members are Comparable to the Comparator Leaves in Duration.

Duration of leaves are comparable when both the military leave and the Comparator Leaves “would not generally be of extended duration.” *Waltermeyer v. Aluminum Co. of Am.*, 804 F.2d 821, 825 (3d Cir. 1986). As the overwhelming majority of short-term military leaves and the Comparator Leaves last only a few days, Defendants instead conflate the concept of duration with frequency and also discuss extended military leaves. Mot. at 14-19. But this framing does not comport with USERRA or its implementing regulations.

a. Duration Means the Length of Time a Leave Lasts.

Duration is “the most significant factor to compare.” 20 C.F.R. § 1002.150. Duration is “[t]he length of time something lasts.” Black’s Law Dictionary (11th ed. 2019); Merriam-Webster, available at <https://www.merriam-webster.com/dictionary/duration> (accessed 6 Apr. 2021 (“the time during which something exists or lasts”)); see *Green v. Brennan*, 136 S. Ct. 1769, 1776 (2016) (referring to dictionary definitions for interpretation of regulatory text).

Ignoring this definition, Defendants assume that duration considers not only the length of the leave, but also the “frequency” with which it is taken. Mot. at 14. “Frequency and duration are two different things.” *Blue Ridge Envtl. Def. League*

1 *v. Pruitt*, 261 F.Supp.3d 53, 60 (D.D.C. 2017) (rejecting an argument conflating
 2 these concepts). Frequency does not address length, but the rate at which
 3 something occurs. Merriam-Webster, *available at* [https://www.merriam-](https://www.merriam-webster.com/dictionary/frequency)
 4 [webster.com/dictionary/frequency](https://www.merriam-webster.com/dictionary/frequency) (accessed 6 Apr. 2021); *see* Alaska Dep. at
 5 167:20-23. The example in regulations illustrates this point by comparing only the
 6 *length of leave*, but not frequency when making a comparison. 20 C.F.R. §
 7 1002.150 (comparing “a two-day funeral leave” with “extended leave for service in
 8 the uniformed service”). Even if frequency (or incidence) is a relevant
 9 consideration, it is of lesser importance than duration. *Infra* I.B.4.

10 **b. USERRA § 4316 Requires Comparing the Duration of Specific**
 11 **Leaves Taken to the Duration of the Comparator Leaves.**

12 Defendants assert that “short-term military leave”—leave of no more than
 13 30 days—is “fictional” and that the appropriate comparison is the duration is all
 14 military leave generally. Mot. at 18-19. But the correct question is whether “any
 15 leave of absence for which his employer provides paid leave is comparable to any
 16 given stretch of military leave.” *White*, 987 F.3d at 625. Thus, the structure of §
 17 4316(b)(1) requires comparing *specific* lengths of military leave to the length of
 18 other, allegedly comparable *forms* of leave offered by the defendant employer.

19 First, the DOL Regulation on USERRA § 4316(b)(1) requires a comparison
 20 of particular length of military absence and the policies governing “comparable
 21 form of leave.” 20 C.F.R. § 1002.150(b). The illustrative example explains that one
 compares a policy about “a two-day funeral leave” with “an extended leave for

1 service in the uniformed service.” *Id.* (emphases added). The relevant question is
2 whether a military leave of a specific duration is treated the same as a comparable
3 length of another form of leave.

4 Second, every Circuit to consider the issue agrees. In addition to the Seventh
5 Circuit, the Fifth Circuit held that here were “genuinely disputable issues as to the
6 material facts of whether involuntary non-military leaves, not generally for
7 extended durations, for jury duty, bereavement, [and sick leave]... are comparable
8 to *each plaintiff’s military leaves* taken for service in the uniformed services.”
9 *Rogers*, 392 F.3d at 771–72 (emphasis added) (reversing summary judgment).
10 Likewise, the Federal Circuit examined the specific duration of military leave (a
11 “two-and-a-half-year absence”) versus short-term paid jury duty/witness leave.
12 *Tully*, 481 F.3d at 1370. The Federal Circuit held that the relevant comparison was
13 to the duration of “the leave provided to the service member for military service.”
14 *Id.* at 1369. That specific duration is then compared to the “typical period” (or
15 duration) of the comparator leave. *Id.*³

16 Third, *short-term military leave* is a specific form of leave at both Horizon
17 and Alaska. Horizon uses separate codes in its scheduling systems to delineate
18 between short-term and long-term military leave. Horizon Dep. at 59:8-19. Alaska

20 ³ *Tully* relied on *Waltermeyer* for its legal principle, but reached an opposite
21 outcome based on the facts. This illustrates that the determination is a fact-based
one that considers the particular absences at issue, not military leave as a category.
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1 categorizes leaves of under 30 days as “short-term.” Alaska Dep. at 121:12-20.
2 From May 1, 2005, to June 30, 2013, Alaska had a letter of agreement with its
3 pilots’ union, under which pilots on “an extended military leave of absence”—
4 more than 30 days in length—could fly a trip or attend training to maintain their
5 flight qualifications. Ex. 12; Ex. 13.

6 Finally, USERRA distinguishes between short-term (30 days or fewer) and
7 long-term military leave (31 days or more). These differences apply to service-
8 members rights to (1) employer sponsored healthcare, 38 U.S.C. § 4317(a)(2), (2)
9 when they need to return to work following leave, 38 U.S.C. § 4312(e)(1)(A)(i),
10 and (3) protection from discharge following a leave of absence, 38 U.S.C. §
11 4316(c)(2). Thus, short-term military leave is not a fiction or manufactured, but is
12 distinct from longer military leave.

13 **c. The Short-term Military Leaves Taken by Class Members are**
14 **Comparable in Duration to the Comparator Leaves.**

15 Defendants rely on their expert’s opinion to argue that the 90th percentile
16 durations of *all lengths of* military leave, rather than short-term leaves, suggest a
17 “categorical difference” based on duration. Mot. at 17-19. Using even that flawed
18 analysis, their calculation of the average military leave is *only* 9 days at Alaska. *Id.*
19 at 17. They admit that most jury duty and bereavement leave is under 9 days. *Id.*

20 When the correct comparison of short-term military leave is compared to the
21 Comparator Leaves, the similarity in duration becomes more apparent. The 90th
percentile duration of short-term military leave at Alaska is 6 days; the average

duration is 3.1 days. Breshears Rebuttal Rep. at ¶¶ 27, 37. The average lengths of jury duty, bereavement leave, sick leave, and vacation are 2.94, 2.77, 2.52, and 6.06 days, respectively. *Id.* at ¶ 35. At Horizon, the 90th percentile duration of short-term military leave is 9 days; the average duration is 4.23 days. *Id.* at ¶¶ 29, 38. The average lengths of jury duty, bereavement leave, sick leave, and vacation at Horizon are 2.66, 2.48, 2.17, and 5.15 days, respectively. *Id.* at ¶ 38. These measures show that short-term military leaves and the Comparator Leaves do not differ substantially in duration. *Id.* at ¶ 34.

Summary of Measures of Leave Duration (in Days)						
Airline	Measure of Duration	Short-term Military	Jury	Bereavement	Sick	Vacation
Alaska	Average	3.10	2.94	2.77	2.52	6.06
	Mode	1	3	2	2	1
	Max at 90th %tile	6	4	4	4	14
Horizon	Average	4.23	2.66	2.48	2.17	5.15
	Mode	2	2	3	2	7
	Max at 90th %tile	9	4	3	4	10
Sources: ECF No. 133-3 at ¶37; ECF No. 132-2 at C-2, C-3. Data from the longest available time period presented. "Mode" means the most common duration of a leave of the given type. "Max at 90th %tile" means the longest duration leave excluding the longest 10% of leaves.						

Such comparisons in durations at the least, sufficiently create a disputed fact issue. The Third Circuit found that a two-week military leave was comparable to other leaves in a CBA, including jury duty, as all “would not generally be of

1 extended duration.” *Waltermeyer*, 804 F.2d at 825.⁴ The Fifth Circuit reversed
2 summary judgment as to whether “non-military leaves, not generally for extended
3 durations,” including “for jury duty, bereavement,” and “sick leave” were
4 “comparable to each plaintiff’s military leaves” for their “annual two week”
5 training. *Rogers*, 392 F.3d at 761, 771–72. Finally, in *Brill v. AK Steel Corp.*, No.
6 2:09-CV-534, 2012 WL 893902 (S.D. Ohio Mar. 14, 2012), the court denied
7 summary judgment, holding that where military leaves “generally last between
8 three and five days, or two and four weeks at the longest,” that “[s]uch a length
9 may be comparable to the duration of jury duty.” *Id.*, at *6. In each of these cases,
10 the courts compared the *short-term* military leaves at issue to certain other leaves
11 provided by the employer.⁵ Here, too, none of the absences on which the Class’s
12 claims are based are of an extended duration. The average, mode and median
13 durations of the Comparator leaves, viewed in the light most favorable to plaintiff,
14 are sufficient for a reasonable jury to conclude that the short-term military leaves
15 of the Class are comparable in duration to the Comparator Leaves.

16 Additionally, Plaintiff’s expert opined that Defendants’ expert’s analysis is
17

18
19 ⁴ USERRA § 4316(b) codified the holding in *Waltermeyer*. See H.R. Rep. 103–65,
Pt. I, *33–34 (April 28, 1993).

20 ⁵ Defendants note that Mr. Clarkson himself never took jury duty or bereavement
21 leave, but USERRA does not require the servicemember to have taken the
comparable leave. See Mot. at 17.

1 “skewed” and “distorted” by the inclusion of a “small number” of extended
2 military leaves that are not part of any claim of the Class. Breshears’ Rebuttal Rep.
3 at ¶¶ 25, 27, 29. Defendants’ own case found “the difference in average length of
4 absence more convincing” than reliance on statistical tails (i.e. the differences at
5 the upper end of duration distributions). *Hoefert v. Am. Airlines, Inc.*, 438
6 F.Supp.3d 724, 740 (N.D. Tex. 2020). “In any event, if outliers are considered,
7 then jury duty and sick leave also can last months in certain cases.” *Duffer v.*
8 *United Contl. Holdings, Inc.*, 173 F.Supp.3d 689, 705 (N.D. Ill. 2016).

9 Disagreements over how to weigh different statistical facts about these
10 distributions, particularly where that issue is the subject of expert disagreement, are
11 jury questions. *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 459 (2016) (“Once
12 a district court finds [expert testimony] to be admissible, its persuasiveness is, in
13 general, a matter for the jury”). Such “[a] factual dispute is best settled by a battle
14 of the experts before the fact finder, not by judicial fiat. Where two credible
15 experts disagree, it is the job of the fact finder, not the trial court, to determine
16 which source is more credible and reliable.” *City of Pomona v. SQM N. Am. Corp.*,
17 750 F.3d 1036, 1049 (9th Cir. 2014); *Bouman v. Block*, 940 F.2d 1211, 1225 (9th
18 Cir. 1991) (“Whether the statistics are undermined or rebutted in a specific case
19 would normally be a question for the trier of fact.”).

20 Defendants’ out-of-circuit cases do not establish otherwise. Defendants note
21 that the *Hoefert* court granted summary judgment on § 4316(b) claims because of

1 differences in duration between jury duty and military leaves. Mot. at 18. But the
 2 *Hoefert* claims involved military leaves of *more than 16 days*. *Hoefert* 438
 3 F.Supp.3d at 730. The average length of the military absences at issue was 23.2
 4 days, which was 12.8 times the average length of jury duty leaves (1.8 days). *Id.* at
 5 740. The longest military absence at issue was 14.6 years, or approximately 102
 6 times the longest leave for jury duty (52 days). *Id.* That dramatically differs from
 7 this case, where the averages are tightly clustered around just a few days and the
 8 longest military absence at issue (30 days) is only slightly longer than the longest
 9 jury duty period at Alaska (20 days). Lee Rep. at ¶ 18 Ex. 6. Defendants only other
 10 case involved military leaves *all of which* lasted longer than 90 days; was not,
 11 “about short leaves of absence.” *Moss*, 420 F.Supp.3d at 774.

12 **1. The Purpose of Short-term Military leaves of Paid Leave Class**
 13 **Members are Comparable to the Comparator Leaves.**

14 Defendants appear to concede that jury duty and military service share the
 15 same purpose of performance of a civic duty. Mot. at 17. Alaska admitted in
 16 discovery that the purposes of military leave include “allowing pilots to perform a
 17 public service.” Alaska Dep. 117:14-118:5; Ex. 7 at No. 17. *see* Cox Decl. at ¶ 20.
 18 Each of the comparator leaves likewise shares a civic or public purpose.

19 Defendants argue that the purposes of jury duty and military leave differ
 20 because servicemembers are paid more than jurors. Mot at 26. This same argument
 21 was rejected on summary judgment by another court. *Brill*, 2012 WL 893902, at
 *7. As the *Brill* court explained, “under Defendants’ reasoning, military leave

1 could never be comparable to any unpaid leave.” *Id.* at *8. Such a result would
2 contrary to both USERRA’s legislative history and the DOL Regulations. *Id.*
3 (quoting H.R. Rep. 103–65, at 34–35 (1993)). Moreover, Defendants’ argument
4 ignores their own admission that the purposes of both military duty and jury duty is
5 to perform a public service. Ex. 7 at Nos. 17 & 18. Clarkson testified he joined the
6 military “to serve” and remained in the military after joining Horizon out of a
7 “commitment to service” to the “nation” and “the constitution.” Clarkson Dep. at
8 276:5-18. That responsibility is the same for pilots at Horizon. Cox Decl. at ¶ 20.

9 At Alaska and Horizon, sick leave, bereavement, and vacation for pilots all
10 share a common public purpose because these forms of leave all share a public
11 safety function. Pilots are not permitted to report for work sick. Limes Dep. at
12 43:12-14; Thomson Dep. 52:13-18. The reason? “Safety. To do your job safely you
13 need to be 100 percent there mentally and physically.” Thomson Dep. 52:19-21.
14 Sick leave serves a public purpose by protecting the safety of airline passengers
15 and the public who might be endangered if illness interfered with a pilot’s ability
16 to fly. Cox Decl. at ¶ 23.

17 Defendants concede that bereavement leave serves a public safety function.
18 Mot. at 24. As a Horizon chief pilot explained, “a bereavement can be extremely
19 upsetting” and the leave exists to provide a plot time “to be away from flying until
20 such time as they are okay with returning to flying.” Thomson Dep. at 59:12-18;
21 *see* Cox Decl. at ¶ 24 (bereavement leave “protect[s] safety of airline passengers

1 who might be endangered if grief interfered with a pilot’s ability to perform their
2 job duties”). Similarly, vacation provides “rest and recuperation for pilots prevent
3 pilot fatigue and burnout,” that serves a public safety function to protect likewise
4 protecting airline passengers and the general public. Cox Decl. at ¶ 25. Thus, all of
5 these leaves share a common purpose with military leave—they serve not just the
6 private interests of the pilot, but the public good.

7 **2. Pilots’ Short-term Military Leave is Comparable to the**
8 **Comparator Leaves on the Ability of Pilots to Choose When to**
9 **take the Leave.**

10 The final factor is “the ability of the employee to choose when to take the
11 leave.” *See* 20 CFR § 1002.150(b). “[W]hat matters is an employee’s control over
12 the timing of her leave of absence—i.e., whether she has the option to choose when
13 to take a given stretch of leave.” *White*, 987 F.3d at 625 (rejecting argument that
14 military duties are voluntary because servicemembers voluntarily join). The Rule
15 30(b)(6) representatives testified that Alaska and Horizon considered military leave
16 to be voluntary. Horizon Dep. at 65:16-19; Horizon Dep. 118:2-5. That argument
17 was rejected by the Seventh Circuit as a legal matter. *White*, 987 F.3d at 625. Now
18 Defendants claim that reservist pilots have “unique and categorically distinct”
19 control over the timing of military leaves. Mot. at 19. Not only is this unsupported
20 by evidence, but the Comparator Leaves and military leaves share a comparable set
21 of constraints combined with a certain amount of pilot flexibility and choice.

Defendants overstate the amount of flexibility that pilot reservists have to
schedule their military duties. Mot. at 21. Pilots are assigned dates for monthly
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1 two-day weekend drills at which all members of the unit are expected to be
2 performing their duties. Clarkson Dep. at 29:12-20. The ability of pilots to
3 reschedule these drill obligations varies based on the status of their currency
4 requirements, and based on rank or leadership responsibilities, Limes Dep. at
5 36:24-37:9, 38:16-39:13. Commanders designate some obligations as “mandatory
6 drill weekends,” and “require everyone to be there” in order to develop unit
7 cohesiveness, and thus pilots cannot reschedule these drills. *Id.* at 38:16-39:13.
8 Pilots also have training and mission obligations outside of drills, and while they
9 have some ability to negotiate their schedule with military officials, that depends
10 on the nature of the mission, the availability of instructors, training needs within
11 the unit, the currency status of pilots, and the availability of training opportunities
12 involving specific military equipment. Clarkson Dep. at 31:13-32:11; Clarkson
13 Decl. ¶¶ 6-8; Limes Dep. at 30:15-23. When pilot reservists are ordered to perform
14 military duty, they do not have a choice regarding whether to perform those duties.
15 Cox Decl. at ¶ 20.

16 Defendants posit that jury summonses are issued in a “regimented fashion”
17 that involuntarily commands service. Mot. at 22. But every state in which a Class
18 member resides (and the federal government), have statutory provisions allowing
19 jurors to defer or be excused from service under certain conditions. *E.g.*, 28 U.S.C.
20 § 1866(c) (permitting deferral of jury service upon showing of undue hardship);
21 RCWA 2.36.100 (permitting deferral of jury duty for “any reason deemed

1 sufficient by the court for a period of time the court deems necessary”); I.C. § 2-
2 212 (permitting postponement “upon a showing of undue hardship, extreme
3 inconvenience, or public necessity, or upon a showing that the juror is a mother
4 breastfeeding”). Defendants attempt to distinguish these provisions from a pilot’s
5 ability to reschedule his military obligations. Mot. at 22. But the process is similar:
6 faced with a conflict or an inability to serve, a juror articulates reasons, the court
7 official either denies the request or grants it and sets an alternative date for service.
8 Defendants also assert that pilots cannot volunteer for jury duty. Mot. at 22. But
9 some jurisdictions permit just that. *E.g.* N.Y. Judiciary Law § 506. Thus, jury duty
10 is similar to military leave in the ability of pilots to choose when to serve.

11 Defendants concede that “pilots at Alaska and Horizon cannot report to duty
12 when they are sick,” but otherwise do not address voluntariness of sick leave. Mot.
13 at 26. Of course, pilots do not choose when they become sick. Cox Decl. ¶ 23;
14 Limes Dep. 41:14-16. But they can use sick leave to attend doctors’ appointments,
15 consult with specialists, or undergo pre-arranged and elective surgical procedures,
16 the timing of which they can control. Limes Dep. at 42:8-22; Thomson Dep. at
17 54:13-55:13. Horizon’s representative testified that sick leave is “voluntary”
18 because “it’s up to the individual to determine when they would need to use their
19 sick leave.” Horizon Dep. at 66:17-22. Thus, while pilots cannot control when they
20 get sick, they do have some flexibility in whether and when to use sick leave.

21 Defendants assert that “a bereavement absence is by definition, not subject

1 to a pilot's control," but do not otherwise address this factor as to bereavement
2 leave. Mot. at 21-22. Of course, pilots do not choose when their family members
3 pass away. Limes Dep. at 43:22-25; Thomson Dep. at 61:6-9. But as Horizon's
4 chief pilot explained, some eligible pilots choose not to take bereavement leave or
5 take only some of the bereavement leave to which they are entitled. Thomson Dep.
6 at 57:15-58:16. And paid bereavement leave can be used to "handle affairs made
7 immediately necessary by the deceased person's death, such as arranging the
8 funeral" or "to attend the funeral" that a memorial service has just arranged and
9 scheduled. ECF No. 138-9 at 129; *see* Limes Dep. at 45:4-18. Thus, while pilots
10 cannot control life and death, they have flexibility and control whether and when to
11 take bereavement leave

12 Defendants do not even address pilots' ability to choose when to take
13 vacation. According to the testimony of their representatives, both military leave
14 and vacation are voluntary. Alaska Dep. 102:22-103:2, 118:2-5; Horizon Dep. at
15 65:16-19, 67:12-14. In addition to that admission of comparability, pilots at both
16 Alaska and Horizon schedule vacations in the Fall of the preceding calendar year,
17 on a seniority basis. ECF No. 138-12 at 7-1; ECF No. 138-8 at 59. Once scheduled,
18 there is flexibility to adjust the dates. ECF No. 138-8 at 60; ECF No. 138-12 at §
19 7(D). As Defendants do not even address vacation, they concede the comparability
20 of this factor as to vacation on this motion.

1 **3. Even if Defendants’ Other Proposed Factors are Considered,**
2 **They Only Create A Disputed Issue of Fact.**

3 Defendants rely on two factors not identified in the DOL regulations. First,
4 they argue that jury duty and bereavement leave are not comparable to military
5 leave in frequency. Mot. at 14-18. Second, they argue that sick leave and vacation
6 are not comparable to military leave because the ability to take sick and vacation
7 accrues over time. *Id.* at 26-27 & n.5. Even if these extraneous factors are an
8 appropriate basis for comparison, they merely create a disputed issue of fact.

9 **a. Even if Frequency is a Relevant Factor, It Merely Creates a**
10 **Disputed Issue of Fact.**

11 Defendants argue that military leave occurs generally more frequently than
12 leave for bereavement or jury duty. Mot. at 14-18. But the frequency of military
13 leave in general should not be a comparability factor because USERRA focuses on
14 comparing specific military absences of employees, rather than military leaves in
15 general, to other forms of leave offered by an employer. *Supra* at I.B.1.b. Even if
16 frequency were a factor, it must be weighed against duration, which is “the most
17 significant factor.” 20 C.F.R. § 1002.150(b).

18 The sole basis for Defendants’ assertion that “frequency” is a potential
19 comparability factor did so in a single passing reference in dicta. *White*, 987 F.3d
20
21

1 at 625.⁶ Like this Court, the Seventh Circuit held that comparability of leaves could
2 not be decided on a motion to dismiss. *Id.* As the *White* district court did not
3 mention frequency and the parties did not brief the question of what extraneous
4 comparability factors should be considered, the Seventh Circuit likely mentioned
5 frequency based on defendants’ mere argument that it should be considered. *See*
6 *White v. United Airlines, Inc.*, 416 F.Supp.3d 736, 739–40 (N.D. Ill. 2019) (finding
7 military leave and jury duty to “be sporadic and uncontrollable in timing”).

8 **b. Character of Accrual is Not an Appropriate Factor for the**
9 **Comparability Analysis.**

10 Defendants assert that sick leave and vacation are not comparable to short-
11 term military leave because Alaska and Horizon “do not simply continue to pay
12 employees their wages or salaries” but rather “whether that absence is paid or
13 unpaid depends entirely on whether the pilot has accrued sufficient” leave to cover
14 the absence. Mot. at 26 & n.5. This argument fails for three reasons.

15 First, Defendants rely on *Hoefert* to suggest that accrual of paid leave is not
16 comparable to military leave as a matter of law simply because the leave benefits
17 accrue. Mot. at 27. Not only does that conflict with this Court’s prior decision, but
18 mere accrual of benefits does not preclude comparability. *Rogers*, 392 F.3d at 772

19
20 ⁶ The other case cited by Defendants is a state court case applying the Alabama
21 constitution’s due process clause, not a case applying USERRA or its predecessor
statutes. *White v. Assoc. Ind. of Ala., Inc.*, 373 So. 2d 616, 619 (Ala. 1979).

1 (finding disputed issue of fact as to whether sick leave comparable); *Paxton*, 712
2 F.Supp.2d at 1016 (finding accrued vacation to be protected by § 4316(b)); *see*
3 *Duffer*, 173 F.Supp.3d at 705 (finding comparability of sick leave with military
4 leave to be a triable issue of fact).

5 Second, Defendants conflate the available relief with a characteristic of the
6 leave and erroneously assume that characteristic bars relief. *See Tully*, 481 F.3d at
7 1370 (rejecting similar rationale because “[t]o allow differences in the available
8 benefits to negate relief under [§] 4316(b)(1)(B) would undermine the effect of the
9 statute, which is designed to remedy differences in the benefits provided for
10 military leave and leave for other purposes.”). If Plaintiff establishes at trial that
11 sick leave or vacation are comparable to short-term military leaves, the Class will
12 be entitled to the same “rights and benefits” afforded pilots who take sick leave or
13 vacation including accrual of leave. 38 U.S.C. § 4316(b). If pilots can accrue sick
14 leave or vacation and use that accrual to protect their absences from loss of pay,
15 pilots can accrue paid military leave, under the same procedures, and use that
16 accrual to protect their absences from loss of pay. Plaintiff’s expert’s damages
17 analysis models hypothetical military leave accruals and usage by Class Members
18 using the same rules as the Comparator Leaves (including sick and vacation).
19 *Breshears Rep.* at ¶¶ 47, 55, 76, 91.

20 Finally, Defendants’ remaining case did not address whether accrual-based
21

1 leaves are comparable to military leave. *Moss*, 420 F.Supp.3d at 775.⁷ As *Moss*
2 involved “military leave longer than 90 days,” the *Moss* court merely distinguished
3 short-term leaves of absence like sick leave from long term leave in what that CBA
4 denominated as a “leave of absence,” *Id.* A “‘leave of absence’ is not a technical
5 term under USERRA but simply means an absence from work.” *Scanlan*, 384
6 F.Supp.3d at 527. Defendants’ interpretation is inconsistent with the application of
7 the equality principle to leaves that “would not generally be of extended duration.”
8 *Waltermeyer*, 804 F.2d at 825.

9 **II. Summary Judgment Should be Denied on Plaintiff’s Virtual Credit**
10 **Claims (Counts I-III).**

11 Defendants argue that Horizon treats all leaves of absence identically. Mot.
12 at 28. But USERRA does not merely prohibit discrimination based on military
13 service, but also provides “protections for service members seeking restoration to
14 employment.” *Kirkendall v. Dep’t of Army*, 479 F.3d 830, 867 n.2 (Fed. Cir. 2007);
15 see *Ouimette v. County of L.A.*, No. 2:12-CV-6268, 2012 WL 6214305, at *4 (C.D.
16 Cal. Dec. 12, 2012) (same). USERRA §§ 4312-4316 do *not require* “that the
17 employer discriminated against [the servicemember.]” *Id.* at *5.

18 **A. Horizon is Not Entitled to Summary Judgment on Counts I & III.**

19 Count I alleges that because the Virtual Credit Policy provided fewer credit
20 hours than Clarkson would have received but for military leave, Horizon failed to
21

⁷ *Moss* is also currently on appeal to the Seventh Circuit.

1 reemploy him in a proper position under USERRA §§ 4312 and 4313. Compl.
2 ¶¶ 61-69. Count III alleges that Horizon violated USERRA § 4316(c) by applying
3 the Policy to demote Clarkson to an inferior position following his military leave
4 of at least 31 days without cause. *Id.* ¶¶ 75-78. Defendants do not dispute that
5 Clarkson satisfied USERRA § 4312(a)'s requirements for reemployment. Mot. at
6 30-32. Instead, they argue that the Horizon pilots' CBA defines "POSITION" and
7 "DOWNGRADED" without mentioning the Regular Line Holder or Reserve status
8 and Clarkson's title remained the same as his pre-service position. *Id.* at 30-32.

9 But a reemployment position must "include[] the seniority, status, and rate
10 of pay that an employee would ordinarily have attained in that position given his or
11 her job history, including prospects for future earnings and advancement." 20
12 C.F.R. § 1002.193(a). "Status" assesses factors such as "the employee's
13 opportunities for advancement," "working conditions," and "shift assignment." *Id.*
14 § 1002.194. The mere fact that the pre- and post-service positions have the same
15 title or definition does not mean that they are equivalent. *Serricchio v. Wachovia*
16 *Secs. LLC*, 658 F.3d 169, 183 (2d Cir. 2011) ("[S]tatus must be assessed with
17 regard to factors beyond mere title or 'rank'"); *Middleton v. City of Sherwood*, 621
18 F.Supp.2d 1089, 1093-95 (D. Or. 2009) (rejecting argument that position with "the
19 same title, rate of pay, and working location" satisfied § 4313). "It is crystal clear
20 that a demotion is the equivalent of a discharge." *Foor v. Torrington Co.*, 170 F.2d
21 487, 490 (7th Cir. 1948); *Hanson v. County of Kitsap*, 21 F.Supp.3d 1124, 1142

1 (W.D. Wash. 2014) (finding that demoting returning servicemember was a
2 discharge under USERRA § 4316(c)).

3 Defendants argue that reserve pilots have a greater minimum pay guarantee
4 (73 hours) than Regular Line Holders. Mot. at 31. But Regular Line Holders were
5 usually provided a 74-80 hour schedule in 2017 and thus made more money than
6 reserve pilots. Cox Decl. ¶ 6. In a rare situation, a pilot may bid reserve to ensure
7 getting “specific days off” if he or she had “junior” status. Horizon Dep. at 119:3-
8 7. By contrast, Regular Line Holder status provides a more predictable schedule
9 and greater certainty of days off. *Id.* at 210:18-211:2; Cox Decl. ¶ 8.

10 Defendants argue that Clarkson suffered no harm because he only had to
11 work additional hours to maintain his Regular Line Holder status. Mot. at 31. This
12 argument mischaracterizes Clarkson’s claims. Counts I and III allege that Clarkson
13 was *both* forced into reserve in July 2017 and was required to work additional
14 hours in June, September, and October 2017 and thus reemployed in a Regular
15 Line Holder position *of lesser status*. Compl. ¶¶ 39-40, 68-69, 77-78; ECF Nos.
16 73-22 ¶ 6. In July 2017, Clarkson had to work on days that should have been his
17 off days but for military leave. ECF Nos. 82-6 ¶ 3. Plaintiff’s expert takes into
18 account all these injuries. ECF No. 138-19 at 2-4. The DOL found that Horizon
19 violated USERRA and Clarkson is entitled to monetary relief. ECF No. 73-25.
20 Defendants’ cases involved whether a plaintiff had standing to seek “injunctive
21 relief,” which Clarkson does not seek. *Lovell v. Consol. Edison Co. of N.Y., Inc.*,

1 758 Fed. Appx. 222, 224 (2d Cir. 2019); *Cunha v. IntelliCheck, LLC*, 254
2 F.Supp.3d 1124, 1138 (N.D. Cal. 2017) (discussing “injunctive relief”). As such,
3 Clarkson has standing to bring Counts I and III for declaratory and monetary relief,
4 summary judgment should be denied on Counts I and III.

5 **B. Horizon is Not Entitled to Summary Judgment on Count II.**

6 Count II alleges that Horizon violated USERRA § 4316(a) by failing to treat
7 military leave as continuous employment in determining Clarkson’s reemployment
8 position. Compl. ¶¶ 70-74. An employer must provide a reemployed employee
9 with “the seniority and other rights and benefits determined by seniority that the
10 person had” on the date the uniformed service began “*plus the additional* seniority
11 and rights and benefits that such person would have attained if the person had
12 remained continuously employed.” 38 U.S.C. § 4316(a) (emphasis added).
13 “Seniority” means “longevity in employment together with any benefits of
14 employment which accrue with, or are determined by, longevity in employment.”
15 *Id.* § 4303(12).

16 Defendants argue that “[a] line schedule at Horizon” is based on work
17 performance, and is not seniority-based. Mot. at 32-33. But this ignores that
18 Horizon awarded line schedules including trips and days off *based on seniority*.
19 Horizon Dep. at 83:1-17, 109:24-110:4, 111:12-24, 119:13-16; Clarkson Dep. at
20 30:11-19; ECF No. 138-8 at § 13.C.7; Cox Decl. ¶ 10. USERRA § 4303(12) does
21 not require that “the number of years an employee worked for an employer” be the
“the sole element.” *Huhmann v. Fed. Express Corp.*, 874 F.3d 1102, 1111 (9th Cir.
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2017). Whether a right or benefit is seniority-based depends on whether (a) it is “a reward for length of service rather than a form of short-term compensation for work performed”; (b) “it is reasonably certain that the employee would have received the right or benefit if he or she had remained continuously employed during the period of service”; and (c) “it is the employer’s actual custom or practice to provide or withhold the right or benefit as a reward for length of service.” 20 C.F.R. § 1002.212. As to the first factor, Count II does not seek compensation based on hours worked but instead the rights and benefits accompanying the Regular Line Holder status that Clarkson would have obtained but for his military leave. Compl. ¶¶ 39-40, 74. These rights and benefits included the minimum pay guarantee of 70 hours and in practice of 74-80 hours and thus a greater earning potential, and a more predictable schedule. Horizon Dep. at 210:18-211:2; Cox Decl. ¶¶ 6, 8. Defendants argue that pilots had to perform “at least some work” after return from military leave. Mot. at 33. But that addresses “the effect” of Horizon’s conduct, not the nature of these rights and benefits. ECF No. 73-25; Clarkson Dep. at 248:8-249:11.

As to the other two factors, Horizon has maintained seniority-based policies or practices of providing these rights and benefits for the Regular Line Holder status while withholding them for those placed on reserve. Horizon Dep. at 210:18-211:2 & 73:8-74:2; Cox Decl. ¶¶ 7-8. Defendants’ pre-USERRA case *Foster v. Dravo Corp.*, 420 U.S. 92 (1975), held that vacation accrual was a form of short-

1 term compensation for work performed and not a seniority-based benefit. *Id.* at
2 100. Consistent with that decision, the “accrual of vacation leave is considered to
3 be a non-seniority benefit” under USERRA. 20 C.F.R. § 1002.150(c). Horizon’s
4 non-vacation accrual cases support Clarkson’s position. *See Coffy v. Republic Steel*
5 *Corp.*, 447 U.S. 191, 205 (1980) (finding supplemental unemployment benefits
6 designed to “provide economic security” to be “perquisites of seniority”); *DeLee v.*
7 *City of Plymouth, Ind.*, 773 F.3d 172, 181-82 (7th Cir. 2014).

8 Defendants argue that Clarkson received under the Policy more credit hours
9 than he would have to average on a daily basis as a Regular Line Holder if he had
10 not been on military leave. Mot. at 33-34. This argument ignores several key facts.
11 First, Turboprop pilots were credited a minimum of 4-4.2 hours per day of flying
12 even if they flew less than that. Horizon Dep. at 121:2-5, 123:6-9, 123:24-124:2,
13 171:11-17; Clarkson Dep. at 219:6-10. Defendants’ use of 2.33 or 2.26 (i.e., 70/30
14 or 70/31) as Clarkson’s daily average of hours worked in a month without military
15 leave fails to take into account this daily minimum guarantee. Second, Horizon
16 guaranteed every pilot a minimum of 12 days off in a 31-day month and 12 days
17 off in a 30-day month without any military leave. ECF No. 138-8 at App. F. As
18 stated above, when pilots could take days off in a month and how many days off
19 were determined in seniority order. Clarkson was required to work on days that
20 should have been his days off. ECF Nos. 73-22 ¶ 6 & 82-6 ¶ 3. Horizon’s
21 management agreed that the 2.45 daily virtual credit value for military leave was

1 “a very low value.” Ex. 9; *see* Ex. 10; Faddis Dep. at 12:23-13:16, 34:24-35:5,
 2 38:7-40:2, 42:12-44:9, 49:9-50:13. The DOL found that the Policy violated
 3 USERRA and that that Clarkson is entitled to damages at his premium rate. ECF
 4 No. 73-25. As such, Clarkson was disadvantaged by the Policy.

5 Defendants argue that Clarkson seeks a “windfall”—i.e., 30 days of virtual
 6 credit equal to 82.5 hours for a month. Mot. at 34. But Clarkson does not seek such
 7 credit as he was on military leave for no more than 26 days in any of the four
 8 months at issue. ECF No. 138-20; ECF No. 138-19 at 2-4. None of Defendants’
 9 cases involved any seniority-based rights or benefits upon reemployment. *See*
 10 *Monroe v. Stand. Oil Co.*, 452 U.S. 549, 561 (1981) (pre-USERRA case that
 11 involved no claims for such rights or benefits); *Crews v. City of Mt. Vernon*, No.
 12 06-1012, 2008 WL 2224898, at *4 (S.D. Ill. May 27, 2008) (addressing USERRA
 13 § 4316(b) claim). Thus, summary judgment should be denied on Count II.

14 **III. Sufficient Evidence Supports Willfulness and Liquidated Damages.**

15 Defendants argue that they should be absolved from liquidated damages
 16 because they did not act willfully based on their assertion of a “good-faith
 17 disagreement about what the law requires.” Mot at 35. But Defendants’ own case
 18 explains that if an employer is notified of a violation, but fails to promptly comply
 19 with the law, that suffices for willfulness. *Petty v. Metro. Gov’t of Nashville &*
 20 *Davidson County*, 687 F.3d 710, 722 (6th Cir. 2012) (affirming award of liquidated
 21 damages); *see Serricchio v. Wachovia Secs. LLC*, 658 F.3d 169, 191 (2d Cir. 2011)
 (affirming liquidated damages where employer did not try to comply); *Reich v.*

1 *Monfort, Inc.*, 144 F.3d 1329, 1335 (10th Cir. 1998) (affirming willfulness finding
2 where employer was on notice of violation). In Defendants other cases, the
3 employer was either never notified or acted promptly to comply with the law.

4 By May 3, 2017, Horizon learned that the daily 2.45 virtual credit hours
5 provided to Turboprop pilots for military leave were “too low” to comply with
6 USERRA. Cox. Decl. ¶ 14 & Ex. B; Faddis Dep. at 18:20-19:8, 22:12-24:17,
7 24:24-25:21, 28:7-31:14. Another pilot filed a grievance to that effect on May 11,
8 2017. Ex. 11; Faddis Dep. at 59:11-25, 60:25-61:3, 64:6-65:16. As Plaintiff’s
9 Virtual Credit Claims arose after that date, Horizon was aware at the time that the
10 virtual credit for military leave was too low. Ex. 9; Ex. 10; Faddis Dep. at 12:23-
11 13:16, 34:24-35:5, 38:7-40:2, 42:12-44:9, 49:9-50:13.

12 As to the Paid Leave Claim, Defendants admit that they were aware by at
13 least January 7, 2019 that their practices violated USERRA § 4316(b). Ex. 6 at No.
14 11; Ex. 7 at No. 18. A jury could find that any good-faith disagreement ended by
15 no later than when the Court denied the motion to dismiss. ECF No. 30 at 17-20.
16 As the Class Period extends until the date of judgment, and Defendants have not
17 changed their practices, they can be liable for liquidated damages at least on leaves
18 after January 7, 2019.

19 CONCLUSION

20 For the forgoing reasons, Defendants’ Motion for Summary Judgement
21 should be denied.

1 Dated April 12, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on April 12, 2021, I caused the foregoing Plaintiff's Opposition to Motion for Summary Judgment to be electronically filed with the Clerk of the Court using the CM/ECF system, which sent notification of such filing to all counsel of record.

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